(9)

No. 87-1988

FILED
JAN 23 1989

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ANTHONY M. FRANK, POSTMASTER GENERAL OF THE UNITED STATES, *et al.*,
Appellants,

v.

MINNESOTA NEWSPAPER ASSOCIATION, INC.,
Appellee.

On Appeal from the United States District Court for the District of Minnesota

---

BRIEF OF APPELLEE

MARK R. ANFINSON *
Lake Calhoun Professional Building
3109 Hennepin Avenue South
Minneapolis, MN 55408
(612) 827-5611

P. CAMERON DEVORE
MARSHALL J. NELSON
STUART R. DUNWOODY
DAVIS WRIGHT & JONES
2600 Century Square
1501 Fourth Avenue
Seattle, WA 98101-1688
(206) 622-3150

Counsel for Minnesota Newspaper Association, Inc.

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

27pp

QUESTIONS PRESENTED

1. Whether this case is moot for the reason that Appellee has no interest in the only issue presented by this appeal, given the government's construction of the statute.

2. Whether, even if this case is not moot, prudential considerations should bar this Court from deciding the abstract issue presented by this appeal, in the absence of any factual record concerning that issue.

3. Whether 18 U.S.C. § 1302 may constitutionally be applied to prohibit the mailing of prize lists appearing in commercial speech other than advertising.

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	4
ARGUMENT	5
I. The Court Has No Jurisdiction to Decide This Appeal, As It Does Not Present a Case or Controversy	5
II. If There Is a Case or Controversy, the Court Should Decline to Decide This Appeal for Lack of a Sufficient Factual Record	8
III. The Government's Proposed Test for Commercial Speech Should Be Rejected	10
A. To Avoid Encroaching on Fully Protected Speech, Commercial Speech Should Be Clearly and Narrowly Defined	10
B. Commercial Speech Either Proposes a Commercial Transaction, or Is an Integral Part of a Commercial Transaction Between the Speaker and Its Audience	12
C. The Government's Proposed Test for Commercial Speech Threatens to Remove It From Its Anchor in Commercial Transactions	14
1. "Promotes or Advances"	14
2. Speaker's "Financial Interest" in the Transaction or Its Promotion	14
3. The Proposed Test Is Not Supported by the Cases the Government Cites	17
CONCLUSION	20

TABLE OF AUTHORITIES

CASES: Page

Alabama State Federation of Labor v. McAdory, 325 U.S. 450 (1945) 10

Allied Tube & Conduit Corp. v. Indian Head, Inc., No. 87-157 (U.S. June 13, 1988) 19, 20

Associated Students for Univ. of California v. Attorney General, 368 F. Supp. 11 (C.D. Cal. 1973) 17

Baker v. Carr, 369 U.S. 186 (1962) 7

Bigelow v. Virginia, 421 U.S. 809 (1975) 18

Board of License Comm'rs v. Pastore, 469 U.S. 238 (1985) 7

Bolger v. Youngs Drug Products Corp., 463 U.S. U.S. 60 (1983) 12, 17, 18, 19

Burton v. United States, 196 U.S. 283 (1905) 10

Central Hudson Gas & Elec. Corp. v. Public Service Comm'n, 447 U.S. 557 (1980) 11, 12, 13, 14, 20

Consolidated Edison Co. v. Public Service Comm'n, 447 U.S. 530 (1980) 14, 15, 17

Deakins v. Monaghan, No. 86-890 (U.S. Jan. 12, 1988) 7, 8

DeFunis v. Odegaard, 416 U.S. 312 (1974) 7

Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985) 17, 19

FCC v. American Broadcasting Co., 347 U.S. 284 (1954) 6

First National Bank v. Bellotti, 435 U.S. 765 (1978) 15, 16

Friedman v. Rogers, 440 U.S. 1 (1979) 12

Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949) 19

Ginzburg v. United States, 383 U.S. 463 (1966) 18

Golden v. Zwickler, 394 U.S. 103 (1969) 7

Hall v. Beals, 396 U.S. 45 (1969) 7

Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981) 9

Horner v. United States, 143 U.S. 570 (1892), 147 U.S. 449 (1893) 13

TABLE OF AUTHORITIES—Continued

	Page
Indiana Employment Div. v. Burney, 409 U.S. 540 (1973)	8
Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270 (1941)	7
NLRB v. Retail Store Employees Union, Local 1001, 447 U.S. 607 (1980)	19, 20
New York Times Co. v. Sullivan, 376 U.S. 254 (1964)	15, 17
Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978)	19
Pacific Gas & Electric Co. v. Public Utilities Comm'n, 475 U.S. 1 (1986)	12, 17
Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986)	11
Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973)	12
Quinn v. Aetna Life & Casualty Co., 482 F. Supp. 22 (E.D.N.Y. 1979), *aff'd*, 616 F.2d 38 (2d Cir. 1980)	16, 17
Rescue Army v. Municipal Court, 331 U.S. 549 (1947)	9
Rutledge v. Liability Insurance Industry, 487 F. Supp. 5 (W.D. La. 1979)	16, 17
Socialist Labor Party v. Gilligan, 406 U.S. 583 (1972)	7, 9
Sosna v. Iowa, 419 U.S. 393 (1975)	8
Spector Motor Service v. McLaughlin, 323 U.S. 101 (1944)	9
Spiritual Psychic Science Church of Truth, Inc. v. City of Azusa, 39 Cal. 3d 501, 703 P.2d 1119, 217 Cal. Rptr. 225 (1985)	12
Thornhill v. Alabama, 310 U.S. 88 (1940)	18
United States v. Munsingwear, Inc., 340 U.S. 36 (1950)	6, 8
Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976)	12
Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985)	10, 12

TABLE OF AUTHORITIES—Continued

CONSTITUTION AND STATUTES:	Page
U.S. Const. Amend. I	*passim*
18 U.S.C. § 1302	*passim*
28 U.S.C. § 1252, repealed by Pub. L. 100-352, § 1, 102 Stat. 662 (1988)	2
39 U.S.C. § 3001	2
39 U.S.C. § 3005	2
Charity Games Advertising Clarification Act of 1988, Pub. L. No. 100-625 (Nov. 7, 1988)	3, 4, 5
Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467 (1988)	3, 4
Minn. Stat. Ann. Ch. 349 (West Supp. 1989)	2
Minn. Stat. Ann. § 609.75 (West 1987)	6
Minn. Stat. Ann. §§ 609.75-.762 (West 1987 & Supp. 1989)	2
Minn. Stat. Ann. § 609.761 (West 1987)	2

OTHER AUTHORITIES:	
J. Boswell, *The Life of Samuel Johnson* (Modern Library)	15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-1956

ANTHONY M. FRANK, POSTMASTER GENERAL OF THE UNITED STATES, *et al.*,
Appellants,

v.

MINNESOTA NEWSPAPER ASSOCIATION, INC.,
Appellee.

On Appeal from the United States District Court for the District of Minnesota

---

BRIEF OF APPELLEE

STATEMENT OF THE CASE

Appellee, Minnesota Newspaper Association, Inc.,[1] is an association of all the general interest, and many of the special interest, newspapers published in Minnesota. J.A. 3.

Minnesota permits nonprofit organizations to conduct lotteries and other games of chance, subject to regulation by the Minnesota Charitable Gaming Board. *See*

---

[1] Minnesota Newspaper Association, Inc. has no parent, subsidiary, or affiliate corporations. (Supreme Court Rule 28.1.)

Minn. Stat. Ann. Ch. 349 (West Supp. 1989) and § 609.761 (West 1987). All other lotteries and gambling are prohibited. Minn. Stat. Ann. §§ 609.75-.762 (West 1987 & Supp. 1989). In addition, various Indian tribes lawfully conduct lotteries and other games of chance in Minnesota. J.A. 4.

The member newspaper of MNA wish to publish news coverage of and advertisements for these legal gambling activities. However, 18 U.S.C. § 1302 and 39 U.S.C. §§ 3001 and 3005 prohibited the mailing of newspapers containing advertisements for or prize lists of a lottery, gift enterprise, or other scheme offering prizes dependent upon chance. Because many of MNA's members rely heavily upon the United States Mail to distribute their newspapers, J.A. 4, 14-15, these statutes forced MNA's members to reject both advertising and news stories concerning these lawful games of chance. J.A. 6, 15. MNA therefore brought suit in the United States District Court for the District of Minnesota seeking a declaration that those statutes were unconstitutional as applied to MNA's member newspapers to the extent they prohibit publication of information about lawful gaming activities, and an injunction enjoining the appellants from enforcing the statutes against MNA's members to the extent they were unconstitutional. J.A. 8.

On cross-motions for summary judgment, the District Court held that Section 1302's prohibition of the mailing of advertisements for lotteries was constitutional, but held unconstitutional its prohibition of the mailing of prize lists. J.S. App. (No. 87-1943) 20a. The District Court permanently enjoined the government from enforcing the prize list provisions of the statute. *Id.* The government appealed the District Court's ruling on prize lists to this Court pursuant to former Section 1252 of Title 28, U.S. Code,[2] and MNA cross-appealed under the

[2] This section was repealed by Pub. L. 100-352, § 1, 102 Stat. 662 (1988), effective September 25, 1988.

same statute for review of the District Court's ruling on the advertising provision of Section 1302.

After this Court noted probable jurisdiction of both appeals, Congress passed two laws substantially changing the issues presented by the appeals. The Charity Games Advertising Clarification Act of 1988, § 2(a), Pub. L. No. 100-625 (Nov. 7, 1988), provides that Section 1302 shall not apply to a lottery that is not prohibited by the State in which it is conducted and that is conducted by a nonprofit or governmental organization, or by a commercial organization as a promotional activity that is clearly occasional and ancillary to its primary business. The Act takes effect eighteen months after its enactment, on May 7, 1990. *Id.*, § 5. Section 21 of the Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467, 2486 (1988), provides that Section 1302 shall not apply to any gaming conducted by an Indian tribe pursuant to that Act.

These two Acts have given MNA all the relief it sought in the District Court. In its suit, MNA sought only to remove prohibitions on mailing newspapers containing news stories, editorials, and advertising concerning games of chance that are lawful in Minnesota, J.A. 4, 6, and 8, and all the games of chance that are lawful in Minnesota meet the requirements of the Charity Games Advertising Clarification Act and the Indian Gaming Regulatory Act.[3] MNA and its member newspapers are content to wait for the former Act to become effective in May 1990 before publishing advertisements for non-Indian games of chance. MNA therefore has dismissed under this

---

[3] The Charity Games Advertising Clarification Act, § 2(a), permits the mailing of newspapers containing advertisements and prize lists for games of chance that are lawful in the state in which they are conducted (and that meet the other requirements of the Act) regardless of whether the games of chance are also legal in the state in which the newspaper is published.

Court's Rule 53 its appeal, No. 87-1943, which challenged the constitutionality of Section 1302's prohibition on the mailing of lottery advertisements. MNA also moved to have the government's appeal dismissed as moot, but the Court denied the motion on January 9, 1988. As is shown below, MNA continues to believe this case is moot.

SUMMARY OF ARGUMENT

The appeal is moot. In view of the enactment of the Charity Games Advertising Clarification Act of 1988 and the Indian Gaming Regulatory Act and in view of the government's position on appeal that the prize list clause of Section 1302 does not apply to advertising, news stories, or editorials, MNA has no interest in the only issue remaining in this appeal—whether the prize list clause may constitutionally prohibit the mailing of prize lists contained in commercial speech other than advertising. As a result, this appeal does not present a case or controversy, and this Court has no jurisdiction to decide it.

Even if this Court does have jurisdiction, it should refrain from deciding this case because resolution of the abstract constitutional question identified by the appellants is not required by the facts presented by the parties, and the Court would have to decide that question theoretically and in the absence of a factual record.

If the Court nonetheless reaches the constitutional issue, MNA disagrees with the government's proposed test for identifying commercial speech, because it would subject to government regulation significant categories of speech fully protected by the First Amendment.

ARGUMENT

I. The Court Has No Jurisdiction to Decide This Appeal, As It Does Not Present a Case or Controversy.

MNA's member newspapers have only two interests in mailing lottery prize lists in violation of the prize list clause of Section 1302:

—mailing newspapers with news stories or editorial commentary containing such prize lists, and

—mailing newspapers with advertising containing such prize lists.

Neither of these interests is affected in any way by the prize list clause as construed by the government. The government concedes that the prize list clause does not apply to "editorials, news stories, or documentaries" about lotteries even if they identify prizes or prize winners. Br. at 30; *see also id.* at 23, 24 and 27. And because Section 1302 separately refers to advertisements, the government does not construe the prize list clause to prohibit the mailing of advertisements containing prize lists. *Id. at* 24. Therefore, in the government's view, the prize list clause prohibits only the mailing of prize lists appearing in commercial speech other than advertising. *Id.* at 23.

Given this construction of the prize list clause, MNA has no interest in the question of its constitutionality, the sole issue presented by this appeal. To be sure, MNA's interest in mailing advertisements containing prize lists is still restricted by the advertisement clause of Section 1302, but the constitutionality of that restriction was the subject of No. 87-1943, which MNA has dismissed, and not this appeal. MNA and its member newspapers are content to wait until the effective date of the Charity Games Advertising Clarification Act to mail advertisements containing prize lists for non-Indian games of chance.

MNA cannot conceive of any circumstances under which it would wish to mail prize lists appearing in commercial speech other than advertising. The government states that such speech would exist when a prize list is published by a party who has a direct financial interest in a lottery or in its promotion. Br. at 23, 29. But MNA's member newspapers have no interest themselves in sponsoring or obtaining a financial interest in a lottery [4], and the only way they could have an arguable financial interest in promoting a lottery is by publishing paid advertisements for a lottery, which, as the government construes the statute, are not covered by the prize list clause.[5]

Because MNA has no interest in the constitutionality of the prize list clause as construed by the government, it asks this Court to vacate the judgment of the District Court to the extent it applies to speech other than news stories and editorials, and to remand it to the District Court with instructions to dismiss MNA's complaint to the extent the judgment has thus been vacated.[6]

---

[4] Minnesota law prohibits for-profit businesses such as MNA's member newspapers from conducting lotteries. Minn. Stat. Ann. § 609.75. Circulation promotions that do not require the payment of consideration as a precondition of participation do not constitute lotteries within the meaning of Section 1302. *FCC v. American Broadcasting Co.*, 347 U.S. 284 (1954).

[5] The government's example of a case in which a newspaper has a direct financial interest in promoting a lottery is where "a newspaper [is] paid to publish a list of lottery prizes or winning lottery numbers." Br. at 29. This is advertising pure and simple, and is no longer before the Court in this case.

[6] This will "clear[] the path for future relitigation of the issues between the parties and eliminate[] a judgment, review of which was prevented through happenstance." *United States v. Munsingwear, Inc.*, 340 U.S. 36, 40 (1950).

Given MNA's lack of interest in the only issue in this appeal, this Court has no jurisdiction to decide it. As the Court reaffirmed last term, "Article III of the Constitution limits federal courts to the adjudication of actual, ongoing controversies between litigants." *Deakins v. Monaghan*, No. 86-890 (Jan. 12, 1988), slip op. at 5 (citations omitted). Where there is no "live controversy" between the parties, the case must be dismissed. *Id.* at 6.

There is no actual, ongoing, live controversy here. MNA has no interest in the speech governed by the prize list clause as the government construes it, and therefore no personal stake in the constitutionality of the clause. "It is axiomatic that the federal courts do not decide abstract questions posed by parties who lack 'a personal stake in the outcome of the controversy.'" *Socialist Labor Party v. Gilligan*, 406 U.S. 583, 586 (1972), quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962). Such a personal stake is necessary "to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illustration of difficult constitutional questions." *Baker v. Carr*, 369 U.S. at 204.

Because a decision on the merits can have no effect on MNA's rights, the case is moot. *Board of License Comm'rs v. Pastore*, 469 U.S. 238 (1985). Even if some situation could be imagined in which MNA might have an interest in the prize list issue before the Court,

> "[S]uch speculative contingencies afford no basis for [this Court's] passing on the substantive issues [the appellants] would have [it] decide," *Hall v. Beals*, 396 U.S. 45, 49 (1969), in the absence of "evidence that this is a prospect of 'immediacy and reality.'" *Golden v. Zwickler*, 394 U.S. 103, 109 (1969); *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941).

DeFunis v. Odegaard, 416 U.S. 312, 320 n. 5 (1974).

Last term's decision in *Deakins v. Monaghan* shows how this appeal should be disposed of.[7] The petitioners there had brought an action in district court seeking both equitable and monetary relief. After the case was brought to this Court on certiorari, the petitioners represented to the Court that they wished to withdraw their claims for equitable relief. As a result, there was no longer a live controversy between the parties on the equitable claims, making them moot. Slip op. at 6. The Court, following *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950), vacated the portion of the judgment below that addressed the equitable claims and remanded the case with instructions to dismiss those claims with prejudice. *Deakins*, slip op. at 7 & 11. MNA similarly represents to the Court that it withdraws its objection to the prize list clause to the extent it prohibits the mailing of speech other than news stories and editorials. The judgment of the District Court with respect to the prize list clause should be vacated to the extent it deals with the mailing of speech other than news stories and editorials and the case remanded to the District Court with instructions to dismiss the prize list claims to the extent the judgment has been thus vacated.[8]

II. If There Is a Case or Controversy, the Court Should Decline to Decide This Appeal for Lack of a Sufficient Factual Record.

Even if this Court, despite MNA's lack of a personal stake in the issue argued by the government, concludes that it has jurisdiction over the appeal, it should decline

---

[7] In *Deakins*, as here, the Court rejected a suggestion of mootness filed before argument, but representations of counsel in response to inquiries at oral argument persuaded the Court that the suggestion of mootness was sound. *Deakins*, slip op. at 6, n.3.

[8] If the Court has any doubt as to whether there is a continuing case or controversy here, it should remand the case to the District Court for consideration of the possibility of mootness. *Sosna v. Iowa*, 419 U.S. 393, 402 n.12 (1975), citing *Indiana Employment Div. v. Burney*, 409 U.S. 540 (1973).

to decide it. To do otherwise would ignore this Court's "oft-repeated admonition that the constitutionality of statutes ought not be decided except in an actual factual setting that makes such a decision necessary." *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 294-95 (1981).

The record before this Court is "extraordinarily skimpy in the sort of proved or admitted facts that would enable [it] to adjudicate" the issue presented. *Socialist Labor Party v. Gilligan*, 406 U.S. at 587. The factual record in the District Court consisted of two affidavits and a five-page summary of gaming activities and laws. J.A. 14-24. These materials provide no information on prize lists and the circumstances under which they might be mailed, nor on the mailing of prize lists in the three situations where the government claims the prize list clause may still have vitality: illegal numbers rackets, commercial lotteries, such as casinos, and state-run lotteries. Br. at 9 n.19. The record thus does not " 'tender[] the underlying constitutional issues in clean-cut and concrete form.' " *Socialist Labor Party*, 406 U.S. at 588, quoting *Rescue Army v. Municipal Court*, 331 U.S. 549, 584 (1974).[9]

As the Court noted in *Rescue Army*, 331 U.S. at 570 n.34:

> "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Spector Motor Service v. McLaughlin*, 323 U.S. 101, 105. It has long been the Court's "con-

[9] The government argued in response to MNA's Motion to Dismiss the Appeal that a factual record was unnecessary because MNA challenged the facial constitutionality of the prize list clause. Opp. to Mot. to Dis. at 6. In fact, MNA challenged the prize list clause *as applied* to its members, J.A. at 8, and in any event, facts are essential even in a facial challenge to a statute's constitutionality. *Socialist Labor Party v. Gilligan*, 406 U.S. at 588.

> sidered practice not to decide abstract, hypothetical or contingent questions . . . or to decide any constitutional question in advance of the necessity for its decision . . . or to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied . . . or to decide any constitutional question except with reference to the particular facts to which it is to be applied . . . . *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450, 461. "It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case." *Burton v. United States*, 196 U.S. 283, 295.

These prudential considerations are especially compelling here. "[T]he precise bounds of the category of expression that may be termed commercial speech" may be "subject to doubt." *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985). The Court should not attempt the difficult task of drawing the constitutional boundaries of commercial speech in a case such as this that presents the question only in abstract form and on an undeveloped factual record.

III. The Government's Proposed Test for Commercial Speech Should Be Rejected.

Although MNA has no interest in the narrow issue presented by the government's appeal, it does have a substantial general interest in preserving First Amendment protection of both news and advertising and in resisting any attempts to expand government regulation of speech. Therefore, in the event the Court should reach the merits of this appeal, MNA will respond to the government's arguments regarding commercial speech.

A. *To Avoid Encroaching on Fully Protected Speech, Commercial Speech Should Be Clearly and Narrowly Defined.*

The government devotes most of its argument to the proposition that commercial speech is not limited to advertisements. Although MNA does not necessarily dis-

agree with this proposition as a theoretical matter, it does take sharp issue with the test the government proposes for determining whether speech is commercial speech, set forth at page 22 of its brief.[10] The government's proposed test is not supported by this Court's cases or by First Amendment theory and should be rejected.

The government's proposed test for commercial speech threatens to redefine much fully protected speech as commercial speech. Because the Constitution "accords a lesser protection to commercial speech than to other constitutionally guaranteed expression," *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557, 563 (1980), it is essential to the continued vitality of freedom of expression that commercial speech be clearly demarcated from fully protected speech. Otherwise a speaker may refrain from engaging in fully protected speech that is close to the line dividing it from commercial speech, *id.* at 581 n.4 (Stevens, J., concurring in the judgment), thereby diminishing public discussion. As this Court has recognized on numerous occasions, freedom of expression requires breathing space. *E.g., Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 772 (1986). The Court should take great care to ensure that any definition of commercial speech is both clear and narrowly drawn, so that fully protected speech will be neither chilled nor improperly regulated.

---

[10] The government proposes the following test:

> The key elements of commercial speech are (a) its subject matter, *i.e.*, whether it promotes or advances an ordinary commercial transaction; (b) the relationship between the speaker, the subject matter, and his audience, *i.e.*, whether the speaker has a direct financial interest in either the transaction or its promotion; and to a lesser degree (c) its format, *i.e.*, whether the speech appears in a form traditionally regarded as commercial advertising.

Br. at 22.

B. *Commercial Speech Either Proposes a Commercial Transaction, or Is an Integral Part of a Commercial Transaction Between the Speaker and Its Audience.*

The "core notion of commercial speech" has long been "speech which does 'no more than propose a commercial transaction.'" *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 66 (1983), quoting *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973) and *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976); *accord*, *Friedman v. Rogers*, 440 U.S. 1, 10 n.9 (1979); *Central Hudson*, 447 U.S. at 562; *Zauderer*, 471 U.S. at 637; *Pacific Gas & Elec. Co. v. Public Utilities Comm'n*, 475 U.S. 1, 9 (1986). Many advertisements do no more than propose a commercial transaction, *Pittsburgh Press*; *Zauderer*, but other speech may fit this definition as well. Justice Stevens has identified "[a] salesman's solicitation, a broker's offer, and a manufacturer's publication of a price list or the terms of his standard warranty" as "unquestionably fit[ting] within this concept," *Central Hudson*, 447 U.S. at 580 (Stevens, J., concurring), presumably because such speech is directly related to a proposed commercial transaction.

While commercial speech may include speech other than that *proposing* a commercial transaction, it must always be an integral part of a proposed or consummated commercial transaction between the speaker and its audience.[11] *See Friedman v. Rogers*, 440 U.S. at 10 n.9

[11] Of course, speech does not become commercial simply because it is the performance contemplated by a commercial transaction. Otherwise, "a lecture for or against Marxism, abortion, nuclear power, or racial supremacy would be commercial speech if people paid an admission charge to hear it, because the lecture would complete the transaction. Such a result would be unprecedented and untenable." *Spiritual Psychic Science Church of Truth, Inc. v. City of Azusa*, 39 Cal. 3d 501, 511, 703 P.2d 1119, 1124, 217 Cal. Rptr. 225, 230 (1985).

("commercial speech is *linked inextricably to commercial activity*") (emphasis added).

It can certainly be argued that the prize list at issue in the case so heavily relied upon by the government, *Horner v. United States*, 143 U.S. 570 (1892), 147 U.S. 449 (1893), fits within the category of commercial speech. That case dealt with Austrian government bonds where the government determined which bonds to call for redemption at several drawings per year. An eventual payment of two hundred gulden was guaranteed for each of the bonds, but more might be paid, and paid sooner, according to the luck of the draw.[12] 143 U.S. at 571-74, n.1; 147 U.S. at 451-53, n.1. Horner was a banker, *see id.*, and while the facts are not entirely clear, it appears that he represented the Austrian government in redeeming the bonds. Assuming that Horner sent the prize list at issue to holders of the bonds, the list was an integral part of the transaction beween the bondholders and Horner's principal, the Austrian government, and was arguably commercial speech.

Restricting commercial speech to that integrally related to a transaction between the speaker and its audience is necessary to insure that fully protected speech is not subject to regulation. In *Central Hudson*, Justice Stevens criticized the majority's passing reference to commercial speech as "expression related solely to the economic interests of the speaker and its audience." 447 U.S. at 561. This definition, he contended, at least threatens to "encompass[] speech that is entitled to the maximum protection afforded by the First Amendment," for, as he noted, "[n]either a labor leader's exhortation to strike, nor an economist's dissertation on the money supply, should receive any lesser protection because the

---

[12] The government misidentifies the prize list in *Horner*. *See* Br. at 27 n.30. In fact, the prize list is the six-column table near the beginning of note 1 on page 572 of 143 U.S., and on page 451 of 147 U.S.

subject matter concerns only the economic interests of the audience." *Central Hudson*, 447 U.S. at 579-80 (Stevens, J., concurring). Rather, such expression should be deemed commercial speech only if it relates directly to a proposed or consummated transaction between the speaker and its audience.

C. *The Government's Proposed Test for Commercial Speech Threatens to Remove It From Its Anchor in Commercial Transactions.*

1. "Promotes or Advances".

The test for commercial speech that the government proposes in its brief threatens to remove commercial speech from its integral relationship with commercial transactions. *But see* Br. at 15 (heading defining commercial speech as expression that is "integrally related to a commercial transaction"). The government suggests that speech is commercial if it "*promotes* or *advances* an ordinary commercial transaction." Br. at 22 (emphasis added). "Promotion" and "advancement" of a commercial transaction are vague concepts that could redefine much expression as commercial speech. For example, a news story covering a charity's bingo game might well have the effect of promoting or advancing the bingo game by publicizing it. The government's explanation that this first element "limits the definition of commercial speech to speech about commercial products and services," *id.*, does not help at all. For example, the speech at issue in *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530 (1980), concerned a commercial product or service—electricity—yet was accorded the full protection of the First Amendment.

2. Speaker's "Financial Interest" in the Transaction or Its Promotion.

The second factor of the government's proposed test for commercial speech is "the relationship between the speaker, the subject matter, and his audience, *i.e.*, whether the speaker has a direct financial interest in

either the transaction or its promotion." Br. at 22. The government subtly changes the meaning of this second element a few lines later by restating it as "the financial interest of the speaker in the good or transaction." *Id.*

This second element again threatens to remove commercial speech from its anchor in a proposed or consummated commercial transaction. It is true that determining whether speech proposes or is an integral part of a commercial transaction between the speaker and its audience requires an examination of the relationship between the speaker and its audience. But the government's test goes beyond that to look at a speaker's financial interest in a product generally rather than in a specific transaction with its audience. Such a test would dangerously expand the scope of commercial speech because protected expression frequently comes from persons with a financial interest in their subject matter.

A speaker's entitlement to First Amendment protection is not determined by its financial interest in or motivation for its speech. The utility in *Consolidated Edison* clearly had a financial interest in its topic—nuclear power generation—but the speech was nonetheless accorded full First Amendment protection. In *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964), the Court held that the fact the Times had been paid to publish the advertisement at issue was as "immaterial" to its entitlement to First Amendment protection "as is the fact that newspapers and books are sold." As Samuel Johnson cogently observed, "No man but a blockhead ever wrote, except for money." J. Boswell, *The Life of Samuel Johnson* 623 (Apr. 5, 1776) (Modern Library).

First National Bank v. Bellotti, 435 U.S. 765 (1978), also confirms that a speaker's financial interest is irrelevant to the constitutional protection afforded speech. The appellants there were national banking associations and

business corporations that wanted to publicize their views on a proposed state constitutional amendment to impose an income tax. 435 U.S. at 768-69. As business corporations, their desire to speak obviously was motivated by financial interest. In determining whether their proposed speech was entitled to First Amendment protection, however, the Court looked at the content of the speech, not at the identity of the speakers and their financial interest. As the Court put it,

> the proper question . . . is not whether corporations "have" First Amendment rights . . . . Instead, the question must be whether [the statute at issue] abridges expression that the First Amendment was meant to protect.

435 U.S. at 776. To answer that question, the court examined the content of the appellants' proposed speech and, finding it to be "at the heart of the First Amendment's protection," *id.*, struck down the restrictions on it.

The irrelevance of a speaker's financial interest in the subject matter of his expression is further confirmed by *Quinn v. Aetna Life & Casualty Co.*, 482 F. Supp. 22 (E.D.N.Y. 1979), *aff'd*, 616 F.2d 38 (2d Cir. 1980) and *Rutledge v. Liability Insurance Industry*, 487 F. Supp. 5 (W.D. La. 1979), where plaintiffs sought to enjoin liability insurers from publishing advertisements deploring high jury awards in tort cases. Both cases held that the advertisements were fully protected speech, not commercial speech, even though the insurance companies had a direct financial interest in their content. *See Rutledge*, 487 F. Supp. at 8 ("nor does the fact that [speech] reflects the advertiser's commercial and financial interests deny it constitutional protection").

The mischief that would be created by the financial interest portion of the government's proposed test can be illustrated by recent events. For example, the New York Times recently published advertisements concerning the

merger of Kraft and Philip Morris, *e.g.*, N.Y. Times, Oct. 18, 1988, at 45, cols. 4-6 (nat'l ed.), and thus under the government's theory presumably had some sort of "financial interest" in the "promotion" of that transaction, but this interest cannot transform the news stories and editorials that the Times published concerning the merger, *e.g.*, *id.*, Nov. 1, 1988, at 33, cols. 3-5 (nat'l ed.) and Nov. 14, 1988, at 22, cols. 1-2 (nat'l ed.) into commercial speech. *New York Times v. Sullivan*, 376 U.S. at 266.

3. The Proposed Test Is Not Supported by the Cases the Government Cites.

The government claims to have derived its proposed test from *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983) and *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), but these cases do not support such a test.

Bolger held that two informational pamphlets published by Youngs, a manufacturer of condoms—one on condoms and the other on venereal disease and the effectiveness of condoms in preventing it—were commercial speech. In reaching this conclusion, the Court held that no one of three factors it enumerated was enough by itself to convert the pamphlets into commercial speech. That the pamphlets were conceded to be advertisements did not make them commercial speech, *Bolger* concluded, citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 265-66 (1964). 463 U.S. at 66. This conclusion is also supported by *Consolidated Edison, Pacific Gas & Elec., Quinn v. Aetna* and *Rutledge v. Liability Insurance Industry, supra.*

Nor did reference in the pamphlets to specific products make them commercial speech, *Bolger* held, citing *Associated Students for Univ. of California v. Attorney General*, 368 F. Supp. 11, 24 (C.D. Cal. 1973). 463 U.S. at 66. Finally, *Bolger* held that "the fact that

Youngs has an economic motivation for mailing the pamphlets would clearly be insufficient by itself to turn the materials into commercial speech," *id.* at 67, citing *Bigelow v. Virginia*, 421 U.S. 809, 818 (1975), *Ginzburg v. United States*, 383 U.S. 463, 474 (1966); and *Thornhill v. Alabama*, 310 U.S. 88 (1940). This conclusion is further supported by the discussion in Section III.B.2. above.

Although it held that none of these three factors alone made the pamphlets commercial speech, *Bolger* concluded that the combination of all of them provided "strong support" for its conclusion that they were commercial speech. 463 U.S. at 67.

Bolger is an unusual case that should be confined to its facts. The characterization of the pamphlets as commercial speech may have been influenced by the fact that one of them specifically referred to and described the advantages of a number of condoms manufactured by Youngs, *id.* at 66-67 n.13, and the other identified Youngs as the distributor of Trojan brand condoms and discussed the virtues of condoms in general.[13] *Id.* The pamphlets thus arguably proposed a commercial transaction—the purchase of condoms by their readers. Moreover, because *Bolger* held that regulation of Young's speech was not justified even under the lower level of First Amendment protection afforded commercial speech, the Court's characterization of its pamphlets as commercial speech was not necessary to its holding. The opinion suggested as much by noting that

---

[13] Young's pamphlet regarding venereal disease, *Bolger* Joint Appendix at 38, extolled the virtues of condoms, noting that they are manufactured to "strict standards of strength, durability, and reliability," are "very easy to open, handle and use," and are available in "the whole range of required sensitivity levels." It also noted that "the pharmacist . . . is best able to offer the particular prophylactic to serve the individual need."

> [t]o the extent any of appellee's mailings could be considered noncommercial speech, our conclusion that [the statute at issue] is unconstitutional as applied would be reinforced.

463 U.S. at 66 n.11.

The government's citation of *Dun & Bradstreet* is misplaced. The plurality opinion there clearly states that the credit report at issue was *not* commercial speech. 472 U.S. at 762 n.8. But under the government's proposed test, the credit report apparently would constitute commercial speech, because it "promotes or advances an ordinary commercial transaction"—the decision whether or not to extend credit—and the speaker had a "direct financial interest" in the promotion of that transaction, having been paid for its credit report.

The government's citation of *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978), to argue that commercial speech includes " 'the exchange of information about securities, corporate proxy statements, the exchange of price and production information among competitors, and employers' threats of retaliation for the labor activities of employees,' " Br. at 19, quoting *Ohralik*, is disingenuous at best. In fact, *Ohralik* cited those not as examples of commercial speech but rather to illustrate that " 'it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed,' " *Ohralik*, 436 U.S. at 456, quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949), and to show that "the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity." 436 U.S. at 456.

NLRB v. Retail Store Employees Union, Local 1001, 447 U.S. 607 (1980) and *Allied Tube & Conduit Corp.*

v. Indian Head, Inc., No. 87-157 (June 13, 1988), are not commercial speech cases, as the government argues, but rather are further examples of situations where the government is not foreclosed from regulating commercial activity simply because speech is a component of the activity. *Retail Store Employees* held that a ban on secondary picketing did not violate the First Amendment because the picketing constituted conduct aimed at "coercing a neutral party to join the fray," 447 U.S. at 616 (plurality opinion). *See also* 447 U.S. at 619 (Stevens, J., concurring) ("picketing is a mixture of conduct and communication"). *Allied Tube & Conduit Corp.* did not consider whether petitioner had engaged in commercial speech. Rather, it was clear that petitioner had engaged in commercial activity—an agreement to exclude respondent's product from a building code, slip op. at 2—that could be regulated despite the fact that speech was a component of the activity.[14]

CONCLUSION

Even if the Court had jurisdiction over this appeal—and MNA respectfully suggests that it does not because of mootness—the Court should not undertake in this case the delicate task of drawing the boundary between commercial speech and fully protected speech. This appeal poses that difficult question only in the abstract, and on an undeveloped factual record.

---

[14] MNA believes that application of Section 1302 to prohibit the mailing of prize lists for lawful games of chance would fail the four-part test of *Central Hudson*, 447 U.S. at 566, even under the government's construction limiting Section 1302 to commercial speech other than advertising, and thus would be an unconstitutional restriction of speech. Specifically, MNA believes the government has no substantial interest in regulating such speech and, even if it has a substantial interest, that Section 1302 does not directly advance it and is more extensive than necessary to serve it. Because MNA has no interest in prize lists appearing in commercial speech other than advertising, however, it will not expand on this point.

The boundary between commercial speech and other forms of expression must be drawn with great care to ensure that speech entitled to First Amendment protection is not impermissibly regulated as commercial speech. The government's proposed test for commercial speech is unacceptable because it would sanction regulation of speech that should receive full First Amendment protection.

The Court should vacate the decision below to the extent it applies to the mailing of prize lists contained in speech other than news stories and editorials, and should remand the case to the district court with instructions to dismiss MNA's complaint to the extent the judgment has thus been vacated.

Respectfully submitted,

MARK R. ANFINSON *
Lake Calhoun Professional
Building
3109 Hennepin Avenue South
Minneapolis, MN 55408
(612) 827-5611

P. CAMERON DEVORE
MARSHALL J. NELSON
STUART R. DUNWOODY
DAVIS WRIGHT & JONES
2600 Century Square
1501 Fourth Avenue
Seattle, WA 98101-1688
(206) 622-3150

Counsel for Minnesota Newspaper Association, Inc.

January 23, 1989

* Counsel of Record